

5.0 REGULATORY IMPACT REVIEW

5.1 Introduction

The purpose of the Regulatory Flexibility Act (RFA) is to reduce the impacts of burdensome regulations and record keeping on small businesses. To achieve this goal, the RFA requires government agencies to describe and analyze the effects of the regulations and possible alternatives on small business entities. On the basis of this information, the Regulatory Impact Review determines whether the proposed action would have a “significant economic impact on a substantial number of small entities.”

The main elements of the RFA are discussed fully in several sections of this document and the relevant sections are incorporated by reference. The following discussion summarizes the consequences for small entities of the proposed action and non-preferred management options to define an insignificance threshold, which is the target level of mortality and serious injury of marine mammals incidental to commercial fishing operations, under the ZMRG.

5.2 Problem Statement

The purpose of and need for defining an insignificance threshold to implement the ZMRG is described in chapter 1 of this EA.

5.3 Objectives

The objectives of this proposed rule is described in Section 1.1 of this document.

5.4 Alternatives

The alternatives considered as an insignificance threshold are discussed in chapter 2 of this document.

5.5 Steps Taken to Minimize the Economic Impact

This proposed rule contains only one action, which is to define through regulation an insignificance threshold as the upper limit of annual incidental mortality and serious injury of marine mammal stocks that can be considered insignificant levels approaching a zero mortality and serious injury rate. An insignificance threshold is estimated as ten percent of the PBR for a stock of marine mammals. With such a limited purpose, steps to

minimize economic impact are not feasible in the proposed rule; however, the MMPA states that in reducing incidental mortality and serious injury to the long-term goal through the development and implementation of take reduction plans, NMFS must take into account the economics of affected fisheries. Therefore, steps to minimize the adverse economic impact of reducing incidental mortality and serious injury would be included in the development and implementation of take reduction plans to meet the long-term goal of reducing incidental mortality and serious injury to insignificant levels approaching a zero mortality and serious injury rate.

5.6 Determination of Insignificant Economic Impact on a Substantial Number of Small Entities

As noted in chapter 4 of this document, the No Action Alternative would result in no regulatory definition of an insignificance threshold, and all remaining alternatives would define such a threshold. An important component of the ZMRG is that once a fishery has achieved an insignificant level of mortality and serious injury, approaching a zero mortality and serious injury rate, then that fishery does not have to reduce its incidental mortality and serious injury further. Therefore, defining the insignificance threshold establishes a regulatory limit to the need to reduce mortality and serious injury. Without such a limit, there would be no threshold below which mortality and serious injury must be reduced. Alternatives 2-4, therefore, would have an economic benefit to the fishing industry compared to the No Action Alternative by establishing a limit to the need to reduce incidental mortality and serious injury.

Chapter 4 indicates the number of and identifies fisheries in each region that would have incidental mortality above the insignificance threshold of at least one stock of marine mammals under the alternatives to define the insignificance threshold. The numbers of such fisheries are 21, 12, and 16 for Alternatives 2-4, respectively (see Table 4-13). The list of fisheries for 2003 identifies a total of 189 fisheries. Therefore, defining an insignificance threshold would be beneficial to 168-177 fisheries (89%-94%), depending upon which alternative was selected because it would be recognized in developing and implementing take reduction plans that most fisheries had already achieved target levels for reducing incidental mortality and serious injury.

Alternative 3 would result in the least number of fisheries being above the insignificance thresholds of stocks of marine mammals; however, as noted in the proposed rule, Alternative 3 is inconsistent with provisions of the MMPA that require a short-term (PBR) and long-term (insignificant levels approaching a zero mortality and serious injury rate) goal for TRPs. Therefore, Alternative 3 would be an unacceptable alternative.

Alternatives 2 and 4 produce equal values for insignificance thresholds of most marine mammals (those of threatened, depleted, or unknown status and having a recovery factor of 0.5 for calculation of PBR). Therefore, fisheries that take any of these stocks would be affected in the same manner under Alternatives 3 and 4. Alternative 2 results in a higher

insignificance threshold for robust stocks (those stocks within OSP or are increasing even when human-caused mortality and serious injury exceeds the calculated PBR and which have a recovery factor of 1.0 for calculating PBR) than does Alternative 4. However, Alternative 2 results in a lower insignificance threshold, therefore, a lower target for reducing mortality and serious injury, for endangered stocks (recovery factor of 0.1 used in the PBR calculation) than Alternative 4. The effect of the lower insignificance threshold for endangered stocks resulting from Alternative 2 means that more fisheries (21) would be above the insignificance threshold than would be the case with Alternative 4 (16).

If mortality and serious injury incidental to a fishery exceed the insignificance threshold of any stock of marine mammals and the fishery is a Category I or II fishery that interacts with a strategic stock, then that fishery is subject to regulation under the TRP process in the MMPA to reduce incidental mortality and serious injury to insignificant levels approaching a zero mortality and serious injury rate. In developing and implementing a plan to reduce incidental mortality and serious injury to meet this goal, NMFS must consider available technology, the economics of the affected fisheries and existing state and regional fishery management plans. Further, the legislative history of the MMPA indicates strongly that Congress did not intend for fisheries to be subjected to a substantial economic burden to meet this goal of the MMPA. Thus, the economic impact of reducing mortality and serious injury of marine mammals would be somewhat limited by appropriate consideration of the economics of affected fisheries when NMFS develops and implements take reduction plans. Furthermore, the MMPA recognizes that appropriations may be insufficient to develop and implement all take reduction plans at once and provided priorities for convening teams. Because resources for marine mammal conservation are not expected to increase substantially in the future, the development of new take reduction plans is expected to be slow, and the accompanying economic effects would be further limited by sequential, rather than concurrent, development of new take reduction plans.

Because the cost of implementing measures to reduce mortality and serious injury in accordance with the ZMRG would be known only when take reduction plans have been developed so that the specific regulatory actions are identified, this analysis is limited to a qualitative evaluation of the economic effects of the alternatives. Each alternative has the potential to effect small entities (businesses and local governments of coastal communities). Most fishing vessels are owned and operated by small business, and most coastal communities are small governments. Coastal communities would be affected by the extent to which fishing businesses in the communities are affected.

This proposed rule would define an insignificance threshold as the upper limit of annual incidental mortality and serious injury of marine mammal stocks by commercial fisheries that can be considered insignificant levels approaching a zero mortality and serious injury rate. This definition would not, by itself, place any additional restrictions on the public. Under provisions of the MMPA, a take reduction team must be established and a take reduction plan developed and implemented within certain time frames if a strategic stock of marine mammals interacts with a Category I or II commercial fishery. The long-term

goal of a take reduction plan is to reduce mortality and serious injury of marine mammals to insignificant levels approaching a zero mortality and serious injury rate, taking into account the economics of affected fisheries, the availability of existing technology, and existing state or regional fishery management plans. Any measures identified in a take reduction plan to reduce incidental mortality and serious injury would require separate rulemaking action before the action could be implemented. Any subsequent restrictions placed on the public to protect marine mammals would be included in separate regulations, and appropriate analyses under the Regulatory Flexibility Act would be conducted during those rulemaking procedures. Hence, implementation of this proposed rule would not have a significant economic impact on a substantial number of small entities. As a result, no regulatory flexibility analysis for this proposed rule has been prepared.

5.7 Determination of Insignificant Regulatory Action

Executive Order 12866 defines a “significant regulatory action” as one that is likely to result in: a) an annual effect on the economy of \$100M or more or one which adversely affects in a material way the economy, a sector of the economy, productivity, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; b) a serious inconsistency or interference with an action taken or planned by another agency; c) novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive Order.

The most notable effect of this rule would be to clarify through regulation the limit to which fisheries had to reduce mortality and serious injury. The proposed rule would clarify that most fisheries had achieved target levels of mortality consistent with the ZMRG and would not have to further reduce incidental mortality and serious injury. Thus, the major impact would be to formalize the current practice through regulation; therefore, the fishing industry and affected local communities would not be subjected to significant additional impact. Existing regulatory actions to reduce mortality and serious injury of marine mammals incidental to fishing operations have been determined to be insignificant, and the combined effect of the present alternatives and existing regulations would remain insignificant.

As noted above, the major impact of the alternatives other than the No Action alternative is positive because each of these alternatives would establish, through regulation, a limit to the extent to which fisheries would have to reduce incidental mortality and serious injury of marine mammals. Alternative 3 is not consistent with the MMPA and is, therefore, not an acceptable alternative. Under Alternatives 2 and 4 most fisheries (89% and 94%, respectively) are already below the target level of mortality and serious injury and would not have to reduce mortality and serious injury any further. For the fisheries that have mortality and serious injury levels that exceed the insignificance threshold of any stock, take reduction plan would eventually have to be developed, and these plans would have to take into account the economic feasibility of measures to reduce mortality

180 and serious injury in the long-term goal of TRPs. The new take reduction plans would
181 have to be developed slowly over time because appropriations are insufficient to develop
182 and implement new plans at this time. Accordingly, the economic impact of the
183 alternatives to define an insignificance threshold would be less than \$100 million;
184 therefore, the rule would be not significant for purposes of Executive Order 12866.
185 Furthermore, the alternatives would not have a significant impact on a substantial number
186 of small entities, and a regulatory flexibility analysis in addition to this preliminary
187 analysis is not required.
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